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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

~~75-~~ 314

No. 73-1770

WILLIS W. RITTER,

Petitioner,

v.

ROGERS C. B. MORTON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on April 4, 1975.

CITATION TO OPINIONS BELOW

The Opinion of the Court of Appeals for the Ninth Circuit printed in Appendix "A" hereto, infra, pp. 1a-20a, is reported in 513 F.2d 942. The Findings of Fact, Conclusions of Law and Judgment of the United States District Court for Idaho printed in Appendix "B" hereto, infra, pp. 1b-7b, is unreported. The Decisions of the Department of the Interior dated November 14, 1960, August 7, 1961 and April 2, 1963 are printed in Appendices "C", "D" and "E" hereto, infra, pp. 1c-5c, pp. 1d-5d and pp. 1e-7e, respectively.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on April 4, 1975. Petition for Rehearing was filed on April 18, 1975. The Order denying the Petition for Rehearing was entered on June 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the District Court was based upon the Constitution of the United States, particularly the Fifth Amendment, and the Administrative Procedure Act, Section 701 through 706 of Title 5, U.S.C. Jurisdiction is also founded upon Sections 2201 and 2202 of Title 28, U.S.C. Section 1331 of Title 28, U.S.C., and Section 1361 of Title 28 U.S.C. This action also arises under the Color of Title Act, 43 U.S.C. Section 1068.

QUESTIONS PRESENTED

(1) Should the Court of Appeals for the Ninth Circuit be reversed for applying a new "special circum-

stances" rule to hold that the traverse lines of a navigable river is a strict boundary of a subdivision conveyed by patent from the United States and for refusing to follow the accepted rule of law that the boundary of a fractional section is the water course of a navigable river and not the surveyor's meander line of the sinuosities of the bank of the river, with the result that the new rule will promote uncertainty, controversy, vexatious litigation and wholesale disruption of land titles.

(2) Should the Court of Appeal's decision be reversed for refusing to follow statutory law and *Railroad v. Schurmeir*, 74 U.S. 272 (1868), which provide that the boundary lines of a lot made fractional by a navigable river must run to the "water course" of the river as the external boundary of such fractional subdivision in the absence of a gross error or fraud against the United States by the surveyor.

(a) In view of the fact that the plat in the instant case which was incorporated by reference into the patent and showed to a demonstration that the meander line represented the border of the river and the record courses and distances were in substantial agreement with the existing bank of the river, should the Ninth Circuit decision be reversed on the ground that the Court refused to follow the rule of *Railroad Co. v. Schurmeir*, 74 U.S. 272, 287:

> . . . *In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows to a dem-*

onstration that the water course, and not the meander line as actually run on the land, is the boundary. (emphasis added)

(3) Should the Ninth Circuit's one-line ruling stating simply that "The decision of the Secretary of Interior under the Color of Title Act is affirmed" be reversed and set aside because the district court reserved ruling on that Count of the Complaint, made no findings or conclusions or judgment on this issue, and the issue was not briefed or argued before the Court of Appeals, thereby denying petitioner the judicial review to which he is entitled under the Administrative Procedure Act.

STATUTES INVOLVED

Section 2 of the Act of 1805, 2 Stat. 313, 43 U.S.C. 752 provides in pertinent part: (Appendix "F" hereto)

> The boundaries and contents of the several sections, half-sections, and quarter sections of the public lands shall be ascertained in conformity with the following principles:
>
> * * *
>
> Second. The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended . . . And the boundary lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed,

> the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the *watercourse*, Indian boundary line, or other external boundary of such fractional township (emphasis added).
>
> * * *

The Color of Title Act is contained in Appendix "G", hereto.

STATEMENT OF FACTS

The dispute in this case concerns the validity of a claim by the United States pursuant to a resurvey of the Snake River area in Idaho in 1955 to title to land designated Lots 9, 10 and 11, containing 8.99, 1.29 and .84 acres respectively (hereafter "disputed lands"). The owners of the riparian uplands of the disputed lands have continuously claimed title to these lands since 1896 when a patent conveying the adjacent upland Lots 5 and 8 was issued. The riparian owners of disputed Lot 9 (the largest) have used it for agricultural purposes since about 1910 when some of the heavy willows covering the land had been partially grubbed out and upriver dams along the Snake commenced controlling spring runoff that partially flooded these lands. The circumference of Lot 9 is still covered by dense willows and the use of Lot 9 has been exclusive to the owners of upland Lots 5 and 8 since that time (Fdg. 5. App. B., p. 5b). Lots 10 and 11 have no commercial value and are covered by thickets of willows.

Pursuant to the 1955 resurvey, the United States now claims not only petitioner's Lots 9, 10 and 11 but

approximately 16,000 additional acres along the Snake River, much of which has been conveyed previously by the government.

Petitioner, in this case, Judge Willis W. Ritter, owns "Thousand Springs Farm" which extends 3 miles along the Snake, a navigable river. The farm includes the upland fractional Lots 5 and 8. Petitioner's title to the disputed lands, Lots 9, 10 and 11, is derived from a record chain of title originating with a patent granted in 1896 which expressly conveys Lots 5 and 8 containing 16.8 and 33.6 acres respectively. An additional 120 acres was included in the remainder of the patent description.

These upland lots are made fractional by the Snake River. They are separated from the disputed lands by a small channel of water fed primarily from a stream, Sand Springs Creek, originating on the upland lots which flows into the Snake. Disputed Lots 9, 10 and 11 once formed a peninsula that has been partially dissected from the mainland by the action of Sand Springs Creek (Fdgs. 6 and 7, App. B., pp. 5b and 6b). The neck of land between the mainland and disputed Lots 9 and 11 has been cut in several places by shallow, willow-clogged channels containing water sometimes no more than ankle depth (Tr. 407), and at times almost dry (Tr. 406).

In 1893, the United States surveyed Township 8 South, Range 14 East of the Boise Meridian, and the plat of survey was approved May 18, 1895. Lots 5 and

8 of Section 17 are described therein, and the patent granting Lots 5 and 8 states that the conveyance is "*according to the Official Plat of the Survey of Said Lands. . .*" (emphasis added). The official plat shows to a demonstration that Lots 5 and 8 border on the Snake River. The surveyor's field notes mention that in coming to the point where the partially dissected peninsula exited the upland, that he was into a dense undergrowth of willows (Tr. 184). The notes recite: ". . . at 2.00 chains Sand Creek 1.00 chain wide. And center dense undergrowth of willows. At 11.00 chains Falls of Sand Creek bears S 53° 15 E about 8 chains distant. . . . at 3.50 cross another branch of Sand Creek 1.00 chain wide course west. . . ." At the time of survey these lots were mud flats, thickly covered with willows so dense as to make it impractical to survey them (Tr. 188). The disputed lands were subject to periodic flooding and indeed were created by sediments deposited when the Snake River overflowed its banks during flood stages (Fdg. 6, App. B, p. 5b). They were not fit for commercial or agricultural use at the time of the survey. The disputed lands have not been flooded since approximately 1912 when a series of upriver dams began to control the flood waters of the Snake River (Tr. 196, 197).

The 1893 surveyor's field records returned to the State Field Office purported to encompass all of the lands in the subdivision. On August 29th, 30th, 31st and September 1st and 2nd, 1893, assigned U.S. Deputy Surveyors and a support team of chainmen and axemen surveyed the west half of Township 8 South, Range

14 East. They surveyed all section lines in the township that crossed the Snake River and placed meander corners at each side of the river. The group then started at set meander corners on the south line of the township and moved north along the river bank with a series of chords. The recorded notes included references to unusual specific objects encountered such as:

> "Across sand bar"
>
> "Opposite of island [upstream from the disputed lands] in river
>
> Several references to abandoned placer works
>
> "Sand Creek Falls bears . . ."
>
> "At end of bluff"
>
> "To a rocky point"

These recordings indicate the detailed records kept in accordance with their oath: "That we will report the true distance to all notable objects."

Undisputed expert testimony at trial described the course of the surveyor in meandering the sinuousities of the banks of the Snake, (Gov't. Br., Ct. of Appeals, p. 15):

> My opinion was that the surveyor was a good surveyor and he was doing a good job, a commendable job, and what he saw to the left of the meander line (i.e. where the disputed lands were located) that he was establishing was *a bunch of willows, a mud flat.* . . . (emphasis added). (Tr. 188).

Because of the nature of this terrain, the surveyor, ac-

cording to good practice, ran his traverse lines to the *east* or upland side of the disputed lands.

The testimony of Government witnesses was that the disputed narrow channel cutting the neck of the peninsula and thereby partially separating Lots 9, 10 and 11 from Lots 5 and 8 was 4 to 8 feet wide (Strickland Tr. 381) but that the channel widened to the north along the main confluence of Sand Springs Creek and the Snake, being up to 25 feet wide (LaMoyne Tr. 380). The depth of the water in the slough or channel between the disputed lands and the upland lots at the neck of the "peninsula" was "ankle deep" (Tr. 407), and in some years the channel was "almost dry" (Kelly Tr. 406), and the water "hardly moving" (Halverson Tr. 423). On the downstream side, which carried the bulk of Sand Springs Creek water, the depth went to as much as 6 feet deep (id.), where Sand Springs Creek cut a channel between Lot 9 and the upland lots and flowed downstream into the Snake. The main channel of the Snake which is to the west of the disputed lands runs between 10 and 35 feet deep (Eardley Tr. 179). The water course and the high and low water marks of the Snake are on the riverside (west side) of the subject lands (Fdg. 8, App. B, p. 6b and Concl. of Law 3, App B, p. 7b)

The Department of the Interior gave petitioner a notice of eviction in July, 1970. On June 24, 1959 plaintiff filed his Color of Title Application pursuant to the provisions of 43 U.S.C. 1068; it was rejected by the Bureau of Land Management; and the rejection affirmed by the Secretary of Interior in 1963.

The district court reviewed the nature of petitioner's action as follows:

> "In Count I of his complaint, plaintiff seeks by review of agency action to have the Court determine that the plaintiff was the owner of the property involved under the provisions of the Color of Title Act. The second and third Counts seek to restrain the Secretary and his agents from interfering with the plaintiff's title and possession of the lands which title is being claimed by way of patent from the United States of America, and mesne conveyances of the plaintiff." (App. B, p. 3b-4b)[1]

The district court ruled that the petitioner held title to the disputed lands "by way of the patent from the United States" (Concl. Law 3, App. B., p. 7b). The court in its Findings of Fact and Conclusions of Law held: (1) The channel of the Snake River in 1893, its "water course" and its high and low water marks were to the *west* of the disputed lands and not between them and the upland lots (Fdg. 8, p. 6b and Concl. of Law 3, p. 7b App. B); (2) The meander line of the Snake River in 1893, at the time of the survey of Lots 5 and 8 was on the west of the disputed lands thereby including them on the upland side (Fdg. 8, App. B., p. 6b); (3) There was no gross error or fraud in connection with the 1893 survey (Fdg. 9, App. B, p. 6b); (4) Petitioner and his predecessor owners of Lots 5 and 8 have had exclusive use of the disputed lands since 1896

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[1] Jurisdiction of the Color of Title claim was founded upon the Administrative Procedure Act.

(Fdg. 5, App. B, p. 5b); and (5) The disputed lands constitute part of the "flood plain" of the Snake which had been partially cut away from the mainland, by the waters flowing from the "copious springs" thereby partially dissecting them from the mainland (Fdg. 6, App. B, p. 5b). The district court stated (id.):

> The subject lands . . . constitute a flood plain of the Snake River which plain was built during flood stages by the deposit of layer upon layer of silt and very fine sand which are the common sediments that the Snake River has carried . . . [*The*] *channels cutting across Lots 5 and 8 resulted from the copious springs flowing from the adjacent basalt cliffs which have converged into waterways across the flood plain and the flood plain has been cut in such a manner that certain remnants such as the subject property have been partially dissected from the mainland.* (emphasis added).

Consistent with these findings, the official plat rendered in 1895 shows the western boundaries of Lots 5 and 8 to the Snake. The plat shows no traverse lines on the west of Lots 5 and 8 inside the shore line of the Snake.

Because the district court held petitioner to have actual title, it did not rule on petitioner's appeal from the Department of the Interior's denial of his claim under the Color of Title Act.

The Court of Appeals for the Ninth Circuit reversed. That Court did not find any fraud or mistake in the survey, nor did it find the surveyor had not prop-

erly run his traverse lines along the sinuosities of the bank of the Snake according to good practice. Nor did the Court dispute the district court's findings that the water course and high water mark of the Snake were on the west of the disputed lands. Nevertheless, the Court adopted a new "special circumstances" rule of law to hold that the traverse lines describing the bank of the Snake constituted a strict boundary of upland Lots 5 and 8, and excluded the disputed lands.

The Court then held that the district court had committed "clear error" by placing the meander lines of the Snake on the *west* (riverside) of the disputed islands rather than the east (upland side). But it was conceded by both parties at trial that the surveyor's traverse lines were to the *east* of the islands. Clearly the district court's reference to the meander of the Snake was to the actual meander or water course of the river and not the traverse lines. (Fdg. 8, App. B, p. 6b). The district court made no finding as to the traverse lines, as that was not in issue. The Court of Appeal's finding of "clear error" was, therefore, gratuitous. In sum, the district court's conclusion that the *actual* meander (not the traverse lines) or water course of the river was to the *west* of the disputed lands (thereby including them) was not challenged by the Court of Appeals.

The "special circumstances" which the Court thought determinative included the fact that the patent

conveyed the exact number of acres in the upland lots,[2] that the plat did not include the islands since it showed the border of Lots 5 and 8 to be the "water's edge" (not the water course) (App. A, p. 14a); that the value of the land, its remoteness and difficulties in surveying should be considered; and the size and value of the terrain omitted should also be evaluated. (App. A, p. 11a). The Court then stated:

> It should be emphasized at this point that these are all merely *factors* to be considered in evaluating the weight to be given to the position of a meander line *vis-a-vis* the boundary. Factual circumstances differ from case to case, and *all* the facts must be considered individually and then considered *in their totality.* (App. A. p. 12a).

The court gave "great weight" to the fractional lots' boundary as shown in the survey and plat, and to the surveyor's omission of the disputed lands, which the Court conceded to be of "relative smallness." (App. A, p. 18a). Finally the Court noted that there were some settlers in the area but erroneously stated that the islands were "continuously used for agricultural purposes" since the time of survey.[3]

The Court of Appeals did not discuss applicability

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[2] The irrelevancy of this fact has been repeatedly established. See page 30 infra.

[3] The evidence was that the lands were partially cleared of dense willows in about 1910, and that some agricultural uses have been made of it since then (Tr. 47, 49, 53; Fdg. 5, App. B. p, 5b).

of the long-established general rule that in the absence of fraud or mistake, the water course of a river is the boundary of a fractional section, not the traverse lines. *Railroad Co. v. Schurmeir*, 74 U.S. (7 Wall.) 272 (1868).

Petitioner's claim under the Color of Title Act, was not briefed or argued by either party before the Court of Appeals, since the district court did not rule on it. The Court of Appeals summarily disposed of the issue in one sentence by simply stating that "[the] decision of the Secretary of the Interior is affirmed" (App. A, p. 20a).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals represents a most serious departure from the 1805 statute, which establishes the boundaries of subdivisions made fractional by navigable rivers, and from past decisions of this Court construing that statute. This body of law has imparted a high degree of certainty, predictability and stability to titles to land lying along navigable rivers. Unless reversed, the Ninth Circuit's decision will, as a practical matter and as a matter of fundamental fairness have extraordinarily wide, adverse ramifications.

Within the jurisdiction of the Ninth Circuit, lie a number of the country's navigable rivers. Along the Snake alone, there are some 500 property owners who are affected by Government resurveys of their river-front property. *Hearings on S. 216 Subcommittee on Public Lands, Senate Committee on Interior and Insular Affairs*, 92nd Cong. 1st Sess. p. 49 (1971).

Under the Omitted Land Act of 1962, the Department of Interior has claimed title to some 16,000 acres along approximately 150 miles of the Snake River pursuant to resurveys. The Department of the Interior in a Memorandum dated May 7, 1975, making specific reference to the decision of the Court of Appeals in this case, states that "when the resurveys were completed and omitted land areas identified, approximately 400 parties were notified by the Bureau that omitted lands fronted their lands along the Snake River." The Memorandum further states that the "lands typically lie between the actual water course of a body of water, and the original surveyed meander lines."[4] The Department of the Interior has made clear its intention to dispossess the above-mentioned 400 persons of 16,000 acres on the basis of the circuit court's decision.

In addition, the decision of the Court of Appeals in an important area of public land law has abandoned heretofore settled principles in favor of ad hoc judicial determinations. The Court of Appeals made clear that no particular factor in its "special circumstances" test controls whether the meander (traverse) lines or the statutory "water course" should be held to be a boundary. Stability and predictability of the validity of land titles are utterly impossible when, as the circuit court held, "the facts must be considered individually and then considered in their totality" (App. A. p. 12a). In short, the effect of the Ninth Circuit's rule is to promote litigation and to cause the government to challenge

[4] The above mentioned Memorandum is reproduced in App. H.

hundreds of land titles that have been settled and relied upon for decades in accordance with heretofore settled rules of law.

The decision of the Court of Appeals accomplishes precisely what this Court held to be intolerable with respect to the stability of grants by the United States. In *Mitchell v. Smale*, 140 U.S. 406, 412-413 (1891), the Court stated:

> We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often *the* most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not be created or sanctioned.

POINT I

THE CIRCUIT COURT ERRED IN FAILING TO APPLY THE DOCTRINE IN RAILROAD CO. v. SCHURMEIR THAT IN THE ABSENCE OF FRAUD OR MISTAKE THE WATER COURSE OF A RIVER IS THE BOUNDARY OF A FRACTIONAL SECTION

WHEN IT IS SHOWN ON THE OFFICIAL PLAT THAT IT BORDERS ON THE RIVER

Section 2 of the Act of February 11, 1805, 2 Stat. 313, 43 U.S.C. 752 is the basic statute designating the manner in which fractional lots must be surveyed and how the boundaries of such lots must be established. That statute specifically states the boundaries of sections bordering on navigable streams must be the "water course" of the river.

Railroad Co. v. Schurmeir, 74 U.S. 272 (1868) applied that statute on facts closely parallel to the facts of the instant case. That case squarely supports the decision of the district court; it is flatly at odds with the decision of the circuit court below, which was rendered on a theory not even argued by the government and which initiated a new approach to fractional subdivision boundary questions. For practical purposes, the Court of Appeals ignored the *Schurmeir* doctrine which has been the leading authority in cases such as this since 1868.

A. *The Official Plat Includes The Disputed Lands In The Boundary of Lots 5 and 8 Under the Rule of Schurmeir.*

The official plat describing fractional Lots 5 and 8 shows them bordered by the Snake River. The law is clear that the water course of the Snake is, therefore, the boundary of Lots 5 and 8 since the water course is defined by the high water mark of the river, *Shively*

v. Bowlby, 152 U.S. 1; *United States v. Ashton*, 170 Fed. 509 (C.A. 9 1909) (appeal dismissed), and since the high water mark was on the west of the disputed lands, the boundary of Lots 5 and 8 includes as a matter of law the disputed Lots 9, 10 and 11.

As stated in *Mitchell v. Smale*, 140 U.S. 406, 413 (1891) in language precisely on point here: "The official plat made from such survey does not show the meander line" but shows the body of water making the lots which border thereon fractional. The patents referring to such plat for identification of the lots conveyed "have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, *as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed* . . ." (emphasis added)

The same principle was stated in *Schurmeir*, 74 U.S. at 287:

> In preparing the official plat from the field-notes, the meander line is represented as the border-line of the stream, and shows, to a demonstration, that the water-course, and not the meander-line, as actually run on the land, is the boundary.

See also *Hardin v. Jordan*, 140 U.S. 371, 381 (1891).

The plat in *Schurmeir* showed the section lines running to the Mississippi just as they run to the Snake in this case. The island lying offshore in *Schurmeir* was not platted, but the Court sustained the finding

that ". . . the plat, as recorded, describes the land as extending to the *main channel* of the river" (74 U.S. at 283) (emphasis added). See also *Smith v. Long*, 281 P.2d 483, 491 (Idaho 1955); *Younie v. Sheek*, 260 Pac. 419 (Idaho 1927) to the effect that the "water course" of the Snake means a main channel and not an insignificant channel. Thus *Schurmeir* held that an insignificant side channel did not constitute the "water course" or the statutory boundary, and, the small channel between the disputed lands in this case and the upland lots does not constitute the boundary of Lots 5 and 8. Rather, that boundary includes the disputed lands whose western boundary constitutes the *water course* and the high water mark of the Snake (Fdg. 8 and Concl. of Law 3, App. B, pp. 6b and 7b). The conclusion that the circuit court below erred is buttressed by the fact that the side channel was cut by Sand Springs Creek, and not the Snake and only partially dissected the disputed lands from the mainland (Fdg. 7, App. B, p. 6b).

B. *Schurmeir is Controlling on the Facts and the Law.*

There are additional similarities between *Schurmeir* and the case at bar as shown in the following comparison with this Court's opinion in that case.

(1) *The Disputed Lands Were Located in Sections Made Fractional by Navigable Rivers. The Plats of the Lands Covered by the Patents Represented the Navigable Rivers as Boundaries on One Side.*

(a) *Schurmeir*: "This fractional section . . . was represented by the plat thereof, as bounded on the north by the east and west sectional line, on the west by the north and south sectional line, and on the only other remaining side by the Mississippi River. It was this river that interposed and made this section a fractional one" (p. 275).

(b) *Ritter*: This fractional section was designated by the *survey* as Lots 5 and 8, Section 17 and was *represented by the Plat* thereof, as bounded on the South by a section line running East and West between Sections 17 and 20; *on the West by the Snake Rvier*; on the North by half section line running East and West through the center of Section 17; on the East by the main rock wall. It was the Snake River that interposed and made this section a fractional one.

(2) *In the Government Surveys no Mention was Made of the Disputed Lands in the Field Notes or in the Plats.*

(a) *Schurmeir*: In the government survey, no mention was made of this bar or island [the disputed land], in the field notes, plat or map. The fractional parcel . . . was represented as lying immediately upon, and bounded by, the Mississippi River (p. 276).

(b) *Ritter*: In the government survey, no mention was made of the so-called "islands," in the field notes, plat or map. The fractional parcel was represented as

lying immediately upon, and bounded by, the Snake River.

(3) *The Surveyors, in Meandering the Course of the Rivers along the Fractions, Ran the "Meander Lines" Along the Mainland of the Shore, and Did Not Include the Space Occupied by the Disputed Lands in the Estimate of the Quantity of Land Contained in the Fraction.*

(a) *Schurmeir*: "The surveyor . . . in meandering the course of the river along the fraction, ran the 'meander-lines' along the mainland of the shore, and not along the . . . bar or island, and thus did not include the space occupied by this depression, and bar or island, in his estimate of the quantity of land contained in the fraction" (p. 276).

(b) *Ritter*: The surveyor in meandering the course of the river along the fraction, ran the "meander lines" along the mainland of the shore, and not along the westerly line of these "islands" and thus did not include the space occupied by the slough or "islands," in his estimate of the quantity of land contained in the fraction.

(4) *The Patent from the United States Described the Fractional Sections as Containing so Many Acres "According to the Official Plat of the Survey," and "Presented the River as the Boundary."*

(a) *Schurmeir*: "[T]he patent (described) the lot . . . as containing so many acres, 'according to the official plat of the survey,' a plat which . . . did not represent the bar or island, in any way, nor the channel or slough between, but presented the river as the boundary . . ." (p. 277).

(b) *Ritter*: The 1896 patent described Lots 5 and 8, and other adjoining lands in Section 17, as containing one hundred and seventy acres and forty-hundredths of an acre, "according to the Official Plat of Survey of the said land, returned to the General Land Office by the Surveyor General," a plat which did not present the "islands," in any way, nor the channel or slough between, but presented the river as the boundary.

(5) *No Gross Error or Fraud was Claimed in Either Case.*

(6) *The United States Did Not Expressly Reserve the Disputed Lands in Either Case.*

Other compelling similiarities in the underlying facts of the *Schurmeir* and *Ritter* cases are that in both cases the disputed lands were low-lying, subject to flooding, and not encompassed by the water course of the navigable rivers. The size of the disputed lands were relatively small (*Ritter*-8.99, 1.29 and .84 acres; *Schurmeir*-2.78 acres), as was the percentage of the disputed lands to the undisputed lands covered by the patent (*Ritter*-6%; *Schurmeir*-30%). The width of the channel which separated the disputed lands from

the upland was narrow (*Ritter*-approximately 4 to 8 feet at the narrowest; *Schurmeir*-28 feet), and the said small channel was shallow (*Ritter*-ankle-deep; *Schurmeir-shallow*). The disputed lands were nearly connected to the upland (*Ritter*-almost dry—once a peninsula — imperceptible rate of flow in small channel; *Schurmeir*-connected in low water.) The surveys in both cases occurred at a period in history when population densities and economic values were low. In Ritter, the population of the entire township was 16 persons, with "one settler in Section 17" (Plf. Ex. 6, Tr. 35).

On these facts and the 1805 statute, the Supreme Court in *Schurmeir* held that the island in the river had been conveyed, and affirmed the Supreme Court of Minnesota. This Court relied upon a well-established rule that should govern this case and which is irreconcilable with the decision of the circuit court. This Court held (74 U.S. at 287):

> In preparing the official plat from the field-notes, the meander-line is represented as the border-line of the stream, and shows, to a demonstration, that the *water course*, and not the meander-line, as actually run on the lands, *is the boundary*" (*Schurmeir* at p. 287, (emphasis added).

We submit that the circuit court's decision erroneously forsook an analysis based upon the general principles stated in *Schurmeir* for a proposition which makes land titles turn upon the subjective judgments of courts in evaluating a myriad of factors whose pertin-

ence cannot be fully known without a court adjudication.

POINT II

THE COURT OF APPEALS ERRED IN HOLDING AN AD HOC EVALUATION OF "SPECIAL CIRCUMSTANCES" SHOULD BE EMPLOYED TO DETERMINE A BOUNDARY.

This Court has adhered strictly to the principle that the "water course" of a river is the boundary of a section fractionalized by a navigable river, even though the surveyor's traverse lines do not correspond exactly to the actual water course of the river as long as the meander lines describe the sinuosities of the bank of the river. *Hardin v. Jordan*, 140 U.S. 371 (1891); *Mitchell v. Smale*, 140 U.S. 406 (1891); *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890); *St. Paul & Pac. R.R. Co. v. Schurmeir*, 74 U.S. 272 (1868).

This general rule is subject to two specific, narrowly defined exceptions: (1) there must have been no fraud, and (2) no gross mistake.

Stability of land titles requires that the United States prove an exception to the general rule by compelling evidence. Thus, there must be some extraordinary proof of mistake by the surveyor, *Hardin v. Jordan*, 140 U.S. 37 (1891); or evidence that "conclusively show[s]" that no water existed at or near the place indicated on that plat, *Jeemes Bayou v. United*

States, 260 U.S. 561 (1923). Moreover, these exceptions are to be applied with great caution and narrowly limited to situations where the error in the survey is substantial, wholly unexplainable, and evidences fraud. *United States v. Zager*, 338 F. Supp. 984 (E.D. Wis. 1972); *United States v. 295.90 Acres of Land*, 368 F. Supp. 1301 (M.D. Fla. 1974).

Of course if the surveyor's suppositious "meander lines" do not in fact describe the sinuosities of the banks of the water course of a river or other body of water, and are run by courses and distances, then the traverse lines constitute the boundary to the adjoining lot and not some body of water in the neighborhood. *Jeemes Bayou Fishing & Hunting Club v. United States*, 260 U.S. 561 (1923); *Producers Oil Co. v. Hanzen*, 238 U.S. 325 (1915); *Horne v. Smith*, 159 U.S. 40 (1895).

Since meander lines can only approximate the actual water course of a river, all surveys necessarily contain omissions of small areas between the meander lines and the actual water course, *Schurmeir, supra* at p. 286-87.

Such areas, although not included in the specific conveyance described in the patent, are conveyed as a matter of law. *Mitchell v. Smale, supra; Gauthier v. Morrison*, 232 U.S. 452, 459 (1914); *United States v. Lane*, 260 U.S. 662, 664 (1923); *Railroad Co. v. Schurmeir, supra.*

In the instant case the circuit court invoked none of the accepted exceptions to avoid the general rule. In-

deed, the Court of Appeals affirmed the district court's findings that there had been no fraud or such gross error to constitute fraud on the government. Nor did the Court of Appeals contend that the surveyor had not actually surveyed the sinuosities of the bank.

Instead, the circuit court held that "special circumstances" made inapplicable the general rule that meander lines are not actual boundary lines (App. A, p. 20a). The court of appeals held that no single factor and no aggregation of factors would necessarily be determinative "in evaluating the weight to be given to the position of a meander line *vis a vis* the boundary . . . [and that] *all* the facts must be considered individually, and then considered *in their totality*" (App. A, p. 12a) In short, each case involving the boundaries of land bordering on a navigable river will be decided on an ad hoc basis according to an unpredictable permutation of circumstances unique to the particular case.

The circuit court relied upon the following language in *Producers Oil Co. v. Hanzen* that "facts and circumstances" may "affirmatively disclose an intention to limit the grant to actual traverse lines" so that they are treated as actual boundaries (238 U.S. at 339). But this relates only to cases, as in *Producers Oil*, where the traverse lines do not purport to meander a river and where the river is not treated as a natural monument. This Court made that point explicit in *Producers Oil*, (238 U.S. at 337):

> The meander line established by Bristol on the east and northeast of Lot No. 1 does not meet

> any of the requirements set forth by the Supreme Court of the United States in defining a meander line in *Railroad Co. v. Schurmeir*, 7 Wall, 272, 286 . . . [T]*he Bristol meander lines does not purport to define the sinuosities of a stream; it is not represented as the border line of a stream; . . . and it shows, to a demonstration, that the meander line, as actually run on the land on the east and northeast of lot No. 1, is the boundary, and that a water course is not the boundary* . . . [emphasis added]

The Court of Appeals also relied on *United States v. Lane*, 260 U.S. 662 (1923); *Jeemes Bayou Club v. United States*, 260 U.S. 561 (1923); and *Niles v. Cedar Point Club*, 175 U.S. 300 (1899). None of these cases support the circuit court. Although *Jeemes Bayou* and *Niles* held that the so-called meander line was a strict boundary, there was compelling evidence in each case of gross error, fraud, or that the surveyor was not meandering the sinuosities of a body of water. The *Lane* case squarely supports the petitioner's position.

Jeemes Bayou involved a claim of title to 500 acres of heavily timbered upland which lay between a body of water and a 48-acre lot that had been surveyed and conveyed. The owner of the latter lot claimed the 500 acres on the basis of *Schurmeir*. The surveyor's field notes showed no intention to meander any body of water and described the boundaries of the 48 acres by courses and distances.

This Court held that the "omission [of the contested lands] was of deliberate purpose, or the result of such

gross and palpable error as to constitute in effect a fraud upon the government" (260 U.S. at 564). Nothing in the Court's decision indicates that when a meander line follows the sinuosities of the bank of a navigable river with substantial accuracy, and the call on the official plat is to a navigable river, that a court may depart from the statutory prescription that the water course is the actual boundary. *Niles v. Cedar Point Club*, 175 U.S. 300 (1899) is likewise not in point since the meander line did not purport to define the sinuosities of the bank of a body of water.

Nor does *United States v. Lane, supra*, stand for the proposition that "special circumstances" may be relied upon as an additional exception to the general rule. Indeed the Supreme Court applied the general rule of *Schurmeir* and refused to apply the gross error or fraud exception of *Jeemes Bayou*. The Court in *Lane* found that the surveyor had in fact meandered the sinuosities of the bank of the river and held the *water course* to be the boundary. The disputed lands lying outside the meander line consisted of 5.67 acres (with 26.8 acres in the fractional subdivision); 12.72 acres (with 23 acres in the fractional subdivision); and 27.87 acres (with 155 acres in the fractional subdivision). Consistent with *United States v. Chandler-Dunbar Co.*, 209 U.S. 447 (1908), the Court held these omitted fragments conveyed by a patent describing the fractional, upland subdivisions, despite the fact that the exact acreage in those fractional lots was specified as the amount of land conveyed. This Court in *Lane* mentioned the value of the lands surveyed, their locality,

wildness, remoteness and attendant difficulties in surveying simply as *an explanation* of why, as a practical matter, a surveyor would run the meander lines of a body of water at some distance from the water's edge, but the Court did not indicate that such circumstances by themselves constituted the basis of a legal "special circumstances" rule, that could be used to overcome the principle that the *water course is the boundary and not the meander lines.* Obviously such "special circumstances" are relevant to issues of gross error or fraud, but there is no hint of such issues in the instant case.

Finally, *Scott v. Lattig*, 227 U.S. 229 (1913), heavily relied upon by the court of appeals, deals with an entirely different concept. The issue was whether owners of lots bordering on the Snake held title to a hard, fast island *located in the Snake across a broad main channel of the Snake 300 feet from one shore and 1,000 feet from the other on the theory of riparian rights.* The island was beyond question far outside the meander lines of the upland lots and also outside and far beyond the banks of the channels of the Snake. The island was unsurveyed at the time of statehood, and the Court held that title had not passed from the United States. No serious question of the applicability of the doctrine of *Railroad Co. v. Schurmeir* was ever raised, as it obviously had no applicability.

The survey in the instant case followed the water course of the Snake far more closely than in *Lane* and was clearly intended to include all land to the *water course of the main channel of the Snake.* The official

plat, which the patent expressly incorporated, in fact shows lots 5 and 8 bordering on the Snake. The disputed lands in this case were not surveyed for the same reason the disputed lands in *Lane* were not surveyed. The uncontradicted testimony at trial (relied upon by the government in its brief below) was (Tr. 188):

> My opinion was that the surveyor was a good surveyor and he was doing a good job, a commendable job, and what he saw to the left of the meander line that he was establishing was a bunch of willows, a mud flat [i.e., the islands in dispute].

The Court of Appeals in applying its "special circumstances" rule looked to facts which neither separately nor in their totality evidence fraud or gross error. First, the Court of Appeals looked to the bulbous nature of the river as shown on the plat at the point where the disputed lands were located; but this was to be expected, since the low-lying, willow covered peninsula (Lots 9, 10 and 11) was there as were the waters of Sand Springs Creek. That Court also relied upon the fact that the patent contained an *exact* number of acres and therefore should be limited to that acreage. But this Court and others have held that fact irrelevant in applying the rule that the water course, not the meander lines, is the boundary. *United States v. Lane*, 260 U.S. 662 (1927); *Whitaker v. McBride*, 197 U.S. 510 (1904); *Hardin v. Jordan*, 140 U.S. 371 (1891); *Internal Improvement Fund v. Novak*, 401 F.2d 708 (C.A. 5, 1968).

Moreover the patent in *Schurmeir* also referred to an exact number of acres.

In both *Schurmeir* and *Ritter* the disputed lands were not included in the estimate of the quantity of land contained in the fraction. (See pages 21-22 of this petition)

The circuit court also said the surveyor mentioned in the survey notes an island upstream from the disputed lands. From this the court speculated that the surveyor must have intended to return and survey the disputed lands. This speculative proposition points up the danger of the "special circumstances" rule. The evidence doesn't show the nature of the upstream island, how high it was above the water of the river, or any of its other characteristics. Mention of the upstream island demonstrates that the surveyor was following his instructions in reporting "all notable objects" and suggests that the willow clogged disputed lands were not "notable".

Surveyors were instructed regarding surveying islands that every island above the mean high-water elevation of any meanderable body of water will be definitely located by triangulation or direction measurement or "*other suitable process*" and will be meandered and shown upon the official plat. Of these three options the surveyor adopted the third and least accurate and estimated the size and distance of the island located in Section 20, while he was at the site. If the surveyor

had determined the disputed land to be islands, he probably would have utilized the techniques previously adopted in Section 20 with respect to islands located there and *estimated* size and distance *while he was at the site.*

The inference relied upon by the Court of Appeals that the surveyor intended to return to survey the disputed lands was expressly rejected in *Grand Rapids and Indiana R. R. Co. v. Butler*, 159 U.S. 87, 91-92 (1894).

Finally, the Court of Appeals references to the 1959 plat (Diagram "B" appended to its decision) and the so-called "Plat Current to 1971" (Diagram "C" appended to its decision) are totally misleading. Diagram "C" was represented by the circuit court as "the most recent plat of the lands in question". Diagram "C" is *not* a plat. The record shows that it was not received as a plat, but for a limited purpose only. *It was not received* to show the relation of the disputed lands to the river, for the reason that the relationships are highly distorted. This document was received only to show the relative acreage of the disputed lands to Lots 5 and 8 (Tr. pp. 301, 309, 312).

Diagram "B" is also highly misleading since the concepts portrayed create erroneous impressions as to the width of channels and the size and nature of lands in relation thereto in 1955 as compared to 1893. This platting procedure in its very nature is not designed to show true conditions, nature of channels, nature of

banks of the stream, extent to which there is an overgrowth of willows, the depth of the channels, etc. — and the conditions are not static. Reliance upon these diagrams in the fashion of the circuit court is to ignore all of the reliable evidence in support of the district court's findings. (For eg. see Plf. Exs. 49 and 50, Tr. 171; and Plf. Ex. 51, Tr. 191).

In addition, the construction of a number of dams and irrigation projects on the Snake subsequent to the 1893 survey contributes to the gross distortion of Diagrams "B" and "C" by making the channels between the upland lots and the disputed lands appear larger. In short the diagrams are inconsistent with the specific findings of the district court.

In sum, the objectives test of *Schurmeir* is abandoned for a subjective analysis of all surrounding circumstances in an attempt to determine what the surveyor intended. Only the imagination of government counsel would limit the totality of facts which the government could present to the trier of the fact to determine what the surveyor intended 80 years ago.

The Ninth Circuit decision makes new law. It sets aside an Act of Congress that has been on the books for 170 years. That court blue pencils it right out of the statutes at large. More than that, it overrules a decision of the Supreme Court of the United States which for

over 100 years has provided clear and definite instructions to surveyors of land bordered by navigable rivers.

Congress and the Supreme Court long ago set at rest the uncertainties concerning the survey of lots made fractional by a navigable river by providing that the boundaries run to the "water course" of the river on which they border. This is a part of the nation's rectangular survey system affecting lands that border navigable rivers, bayous, lakes *all over the United States.*

The vice of the Ninth Circuit decision if followed is that ownership of lands bordering on every navigable body of water in the United States will be in a state of confusion and uncertainty. At once it unsettles property rights on the borders of the Snake River from Jackson Hole, Wyoming, through Idaho, Oregon and Washington.

The resulting vexatious litigation will burden and clog the already heavy dockets of federal courts.

POINT III

THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE SECRETARY OF THE INTERIOR UNDER THE COLOR OF TITLE ACT AND THE MATTER SHOULD BE REMANDED TO THE TRIAL COURT FOR FURTHER PROCEEDINGS.

The pro forma affirmance of the decision of the

Secretary of the Interior on Count I of the complaint involving the Color of Title Act, without any independent judicial review clearly violates petitioner's rights to a judicial review of agency action under the Administrative Procedure Act.

The Color of Title Act issue was not passed on by the district court and was neither briefed nor argued in the court of appeals. The pro forma decision of the court of appeals affirming the Secretary did not constitute judicial review or an analysis of the applicable legal principles.

The issues reserved by the lower court involved substantial considerations relating to the vitality of the Color of Title Act.

The restrictive and limited interpretation placed upon the Color of Title Act by the Secretary severely frustrates the intent of Congress. The initial decision of the Land Office and the decision of the Acting Chief, Devision of Appeals in the initial appeal held that color of title must be founded upon an instrument in writing, and that no such instrument existed since the patents described only Lots 5 and 8 and other upland. There was no "deed or other instrument which purports to pass title and which appears to be title to the land . . ." (App. C, p. 4c; App. D, p. 3d).

On appeal the Secretary of the Interior ruled, in effect that a change in a state court law rejecting the view that actual title existed under the doctrine of ripar-

ian rights established that subsequent property owners could not possess the property in good faith to satisfy elements of the Color of Title Act (App. E, pp. 4e-5e).

As held in *Cameron v. United States*, 148 U.S. 301, 308 where a deed is fairly open to construction as to property covered by a survey, color of title exists. The Secretary of the Interior did not consider the law of *Schurmeir* as it affects Color of Title issues, apart from actual title. Nor did it consider federal law establishing that boundaries of a fractional subdivision extend to the water course when the boundary on a plat establishing such fractional subdivisions shows the river to be the boundary.

CONCLUSION

We respectfully submit that a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit in this matter.

Respectfully submitted,

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